(7)

No. 90-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

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* There have been no changes in the parties to the proceedings listed on page ii of Arkansas' petition.

TABLE OF AUTHORITIES

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Respondents' brief in opposition is most revealing for the points that it implicitly concedes and declines to address. *See* Section I *infra*. But even the points that Oklahoma does choose to address in no way diminish the need for Supreme Court review or demonstrate that this case is inappropriate for resolution of the issues presented. *See* Section II *infra*.

I. RESPONDENTS' DEFENSE OF THE DECISION BELOW ACTUALLY EMPHASIZES THE NEED FOR SUPREME COURT REVIEW.

In defending the decision below, Oklahoma readily confirms the sweeping nature of the Tenth Circuit's first holding regarding the applicability of downstream state standards to facilities in upstream states. Not only *must* EPA and state permitting agencies apply the downstream state standards, but they have absolutely no discretion to depart from or interpret those standards. *See, e.g.*, Br. Opp. at 11, 16 (mandating "strict compliance"). In respondents' view, the Tenth Circuit was fully justified in giving downstream states a veto power over the permitting of sources in upstream states.

Similarly, Oklahoma is quick to support the absolute nature of the Tenth Circuit's second holding requiring a ban on new permits. Although respondents suggest the ban might not apply in other states (a point addressed in Section II.C *infra*), Oklahoma explicitly endorses the mandatory and immediate nature of the ban where it does apply. The ban even precludes issuance of permits for new sources that would have no detectable adverse effect on water quality. Br. Opp. at 13-14. As shown by EPA, Arkansas, and the states and cities submitting *amicus* briefs, however, this ban would dramatically change the existing regulatory system, and whether intended or not by Oklahoma, it is already being invoked by federal agencies in other states and circuits. *See infra* note 4.

Finally, apart from a passing disclaimer, respondents prefer to ignore the revolutionary impact of the Tenth Circuit's decision. *See* EPA Pet. at 13, 23; Ark. Pet. at 8, 26-29. As the petitions by both EPA and Arkansas demonstrate, and the *amicus* briefs submitted by other states, cities and industries confirm, the change in law mandated by the Tenth Circuit will severely disrupt the Clean Water Act (CWA) permitting process and jeopardize the permits for countless facilities now under construction or in planning. *See* Brief of Colorado *et al.* as *Amici Curiae* at 8-9; Brief of Montana as *Amicus Curiae* at 6; Brief of The Association of Metropolitan Sewerage Agencies *et al.* as *Amici Curiae* at 17-18; Brief of Champion International Corp. *et al.* as *Amici Curiae* at 12-13. Again, Oklahoma treats that impact as only appropriate, and it offers these other affected parties no quarter.

After a decade of disputes with Arkansas over interstate waterways, Oklahoma has finally achieved its own parochial objectives in the Tenth Circuit. But the rest of the nation now has to live with the disruptive effects of the Tenth Circuit's decision, absent review by this Court. Respondents' effort to ignore these nationwide consequences does not make them disappear.

II. RESPONDENTS' SPECIFIC ARGUMENTS DO NOT DIMINISH THE IMPORTANCE OF THE ISSUES PRESENTED.

A. Respondents' Assertion Of "Correctness" Is Not A Reason For Denying Review.

Respondents' primary ground for opposing certiorari is that they believe the Tenth Circuit's decision is clearly "correct." Br. Opp. at 15. Most prevailing parties feel that way. Before succeeding in the Tenth Circuit, however, Oklahoma fully agreed that these interstate issues were substantial and itself urged that resolution by the Supreme Court was necessary. Motion of Oklahoma for Leave to File Complaint, *Oklahoma* v. *Arkansas* (No. 93, Orig.), *motion denied*, 460 U.S. 1020 (1983). Moreover,

respondents base their new patina of clarity on nothing more than isolated snippets of statutory language and an unsubstantiated assertion that the Tenth Circuit's decision is consistent with current practice under the CWA. Br. Opp. at 16-17.

The question presented is whether the CWA *compels* permitting agencies to apply, without any deviation or flexibility, the standards of downstream states. Arkansas contends that the statute gives agencies the *discretion* to apply these standards and to decide how they should be considered in any given case. Oklahoma's rigid view to the contrary certainly is not compelled by the statute (even the Tenth Circuit needed over thirty pages to justify its conclusion), and that view has not previously been accepted in any other litigation. Moreover, Oklahoma's view completely ignores the language in § 402, among other provisions. Section 402 was specifically intended by Congress to address the precise question at issue and expressly treats downstream standards as a discretionary consideration, rather than as automatically applicable. CWA § 402(b)(5), (d)(2), 33 U.S.C. § 1342 (b)(5), (d)(2); Ark. Pet. at 14-15.[1]

Respondents are on even weaker ground in asserting that the Tenth Circuit's holding is consistent with the current administration of the CWA. Respondents offer no evidence to support this claim and, in fact, the *amicus* briefs filed by various states directly contradict the respondents. As those briefs explain, the current practice of states with approved permitting programs is to consider only the water quality standards of the source state, and not downstream states, when evaluating a permit application. Brief of Colorado *et al.* as *Amici Curiae* at 6; Brief of Montana as *Amicus Curiae* at 6. Thus, far from supporting the Tenth Circuit's decision, the ac-

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[1] It would make no sense to suggest that EPA has even less discretion in the application of downstream standards when it is the permitting agency under § 401, 33 U.S.C. § 1341.

tual practice in administering the Act runs directly contrary to the court's new construction.

Respondents' assertion of "correctness" is further refuted by the untenable situation created as a result of the Tenth Circuit's elimination of any mechanism for balancing the competing interests of upstream and downstream states. As the brief submitted by the municipal *amici* demonstrates, the statutory scheme must provide some flexibility to accommodate both upstream and downstream state interests. Brief of The Association of Metropolitan Sewerage Agencies *et al.* as *Amici Curiae* at 7-14. Indeed, even Oklahoma agrees that some mechanism for accommodation must exist and suggests that EPA can "disapprove" downstream standards that would unreasonably affect upstream interests. Br. Opp. at 23. Unfortunately, both the courts and EPA have concluded that, under § 510 of the CWA, the Agency "is not authorized to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." EPA, 54 Fed. Reg. 39,099 (Sept. 22, 1989); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979). Adoption of the Tenth Circuit's position would therefore remove the only available mechanism for EPA to mediate interstate disputes over the application of conflicting water quality standards.

Finally, notwithstanding Oklahoma's wishful characterization, EPA does *not* support Oklahoma's position on this issue. The Tenth Circuit's decision effectively eliminates any Agency flexibility or discretion in applying downstream state standards, and EPA's petition clearly confirms that it is seeking review of the court's interstate holding. As EPA concluded, the Tenth Circuit's decision "has significantly undermined EPA's authority to implement the Clean Water Act by usurping EPA's role under the Act as arbiter of interstate water pollution disputes." EPA Pet. at 12-13. Consequently, even though EPA may advocate a somewhat different approach than the Arkansas petitioners, Oklahoma's characterization of EPA's position should be recognized as

nothing more than an attempt to obfuscate the court's radical departure from current practice.[2]

B. Respondents Fail to Explain Away The Conflict Created By The Tenth Circuit's Decision.

Respondents' rhetoric and superficial readings similarly fail to explain away the conflict between the Tenth Circuit's holdings and the decisions of this Court and other circuits. With respect to *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), Oklahoma dismisses this Court's detailed discussion of the issue as mere dicta. This "distinction" simply reflects a refusal to examine the substance of the Court's decision. The Supreme Court's preemption holding necessarily required the Court to interpret the Clean Water Act's provisions on the interstate application of water quality standards before the Court could decide whether these provisions conflicted with, and therefore preempted, the application of a downstream state's common law. *See* Ark. Pet. at 12 n.10. Thus, this Court's conclusion in *Ouellette* that a downstream state could not impose its standards under the CWA on out-of-state sources was an essential part of the Court's holding. In any event, lower courts are not free to disregard at will this Court's explanation of the law. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part) (a statute that has been construed by the Supreme Court "acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself").

Respondents are equally mistaken in attempting to distinguish *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985), on the ground that it only dealt with state common law. Br.

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[2] In fact, respondents' brief is internally inconsistent on this issue. At some points in their brief, respondents do concede that EPA's "present position" would allow for "administrative balancing" between the downstream standard and "other considerations." Br. Opp. at 21-22.

Opp. at 19. In fact, this decision involved the interstate application of both Illinois common law *and* the Illinois water quality standards adopted under state statutes and approved under the Clean Water Act. 731 F.2d at 406. Furthermore, the Seventh Circuit held that a downstream state could not apply *either* its common law or its water quality standards against out-of-state sources. *Id.* at 414. In short, a fair reading of these and the other decisions addressed in Arkansas' petition demonstrates a substantial conflict in the precedent, which can only be resolved by this Court.

C. Respondents Cannot Artificially Limit The Tenth Circuit's Decision To An Interpretation Of Oklahoma Water Quality Standards.

Having won their own ban on any new Arkansas discharges that reach their border, Oklahoma now suggests that this ban might not apply in other states. While the ban on new permits that Oklahoma advocated below may have been confined in this manner, the Tenth Circuit made clear that it was adopting a much more sweeping holding than the argument advanced by Oklahoma. Indeed, in justifying its decision not to remand the case, the court explicitly stated that it was creating a new test, going far beyond the position advocated by Oklahoma, and that the parties "did not recognize the real significance of this issue." Ark. Pet. App. at 54a n.40.

The nationwide applicability of *the court's* permit ban is readily demonstrated by the court's opinion. Specifically, the court predicated the ban on its interpretation of the Clean Water Act, rather than on Oklahoma's non-degradation standard. *See, e.g.*, Ark. Pet. App. at 82a. The Tenth Circuit repeatedly relied on the intent of Congress and the legislative history of the CWA to justify its permit ban holding, without even referring to the intent of the specific Oklahoma standard involved in this case. *See, e.g., id.* at 83a ("the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement").

See also id. at 76a, 78a-79a. In addition, the Tenth Circuit emphasized that the permit ban is triggered by a pre-existing violation of *any* relevant water quality standard.[3] *See, e.g., id.* at 54a, 75a. According to the court, EPA's failure to impose a permit ban upstream from an existing water quality violation was the "principal flaw in the agency's decision-making rationale." *Id.* at 75a.

In sum, regardless of what Oklahoma may have intended, the Tenth Circuit's permit ban is applicable to any stream with an existing violation of a water quality standard. Oklahoma's artificial construction therefore cannot avoid the severe nationwide impact described by Arkansas' petition and the *amicus* briefs. *See, e.g.*, Ark. Pet. at 27-29. In fact, the Tenth Circuit's holding already is being applied nationwide exactly as predicted by the Arkansas petition.[4]

D. The Permit Renewal Proceedings Do Not Diminish The Need For Immediate Review By This Court.

Respondents also suggest that this case is inappropriate for review because the Fayetteville facility's discharge permit is up for renewal and Arkansas, rather than EPA, is now the permitting agency. Br. Opp. at 25.

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[3] Furthermore, as explained in EPA's petition, even if the court's holding had been based on an interpretation of Oklahoma's non-degradation standard rather than the CWA, the holding would still have a dramatic nationwide impact because every state is required to adopt a similar non-degradation policy based on EPA's model standard. 40 C.F.R. § 131.12.

[4] For example, the U.S. Fish and Wildlife Service and other interest groups have submitted comments on a draft NPDES permit (AK-004978-6) in Alaska arguing that the permit must be denied because there is a pre-existing downstream violation of a relevant water quality standard, based specifically on the Tenth Circuit's decision. *See, e.g.*, Comments of U.S. Dept. of the Interior, Fish and Wildlife Service, to U.S. EPA, Region 10, Feb. 12, 1991. Thus, despite respondents' characterization, the Tenth Circuit's permit ban holding is already being used to block new permits throughout the nation, even in contexts that involve only a single state.

This suggestion is a red herring and has no bearing on the appropriateness of review. Respondents' own brief states that "the Court of Appeals' decision establishes the law to be applied in such subsequent proceedings." *Id.* In addition, Oklahoma has made clear its intention to use the Tenth Circuit's decision to block the renewal of the Fayetteville permit.[5] Moreover, Oklahoma does not point to any specific change in the Oklahoma standards or the other circumstances of the case that would make the Tenth Circuit's holdings less relevant or determinative in the permit renewal proceeding.

Thus, as a matter of law and fact, the permit renewal proceedings do not in any way moot the issues presented by Arkansas' petition. In addition to the factors discussed above, the Fayetteville plant's ability to continue operating during the lengthy renewal proceedings will depend on the legal validity of the existing permit. Absent review, Oklahoma will undoubtedly contend that the Tenth Circuit's decision requires the Fayetteville plant to immediately stop discharging into the Illinois River basin, forcing the plant to shut down. Consequently, even Oklahoma was ca[illegible] not to suggest that the Tenth Circuit's decision is [illegible]

Moreover, NPDES [illegible]mits are issued for a maximum of five years. Because evidentiary hearings on a permit are conducted after the permit is issued, and given the length of time it takes for judicial review after completion of the evidentiary hearings, there would almost never be time to get Supreme Court review of a permit decision if the time for review expires at the end of the five year permit period.

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[5] *See, e.g.*, Letter from Brita Haugland Cantrell, Assistant A.G. of Oklahoma to Arkansas Dept. of Pollution Control & Ecology, Dec. 21, 1990 (Oklahoma "preserves all rights won in *EPA v. Oklahoma*, 908 F.2d 595 (10th Cir. 1990) as applied to that permit and any successive permits for the Fayetteville discharge. This objection to the Fayetteville permit, upheld by the Tenth Circuit in that case, likewise applies to this draft Permit and any successive permits.").

Finally, the appropriateness of immediate review by this Court is reinforced by the tremendous consequences of these issues for the nation as a whole. With each day that passes, the Tenth Circuit's decision is exacerbating interstate conflicts, disrupting permit programs, jeopardizing the permits for countless public and private facilities across the nation, and otherwise creating intolerable uncertainty for the expenditure of scarce public resources. While Oklahoma's primary interest may be in preserving its victory in the court below, the rest of the country needs an immediate resolution by this Court.

E. The Facts Of This Case Confirm the Extreme Scope Of The Tenth Circuit's Decision.

While the factual context of this case is not critical for deciding the central legal issues presented, a balanced portrayal of the record before EPA demonstrates the extreme scope and consequences of the Tenth Circuit's decision.

For example, the quality of the Fayetteville effluent actually exceeds the quality of the Illinois River in Arkansas and Oklahoma, contrary to respondents' insinuation that the plant is polluting the river. At most, respondents presented evidence suggesting that the Fayetteville discharge may increase phosphorous levels in the Illinois River at the Oklahoma border by six pounds per day. Br. Opp. at 11.[6] However, respondents fail to mention that this small amount of additional phosphorous will be accompanied by a proportionally much larger increase in water flow, since most of the water discharged by the Fayetteville facility originally came from outside the Illinois River basin.

The concentration of phosphorous and other substances in the Fayetteville effluent will therefore actually be lower than in the Illinois River at the point of confluence. Thus,

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[6] *Every* expert who testified at the permit hearings concluded that the Fayetteville effluent would result in no change in any observable parameter of water quality. *See, e.g.*, Ark. Pet. App. at 130a-132a.

the Fayetteville discharge will result in a net dilution of pollutants in the river and actually improve water quality by, for example, increasing dissolved oxygen levels. Ark. Pet. App. at 139a. Moreover, EPA's expert witness at the hearings on the Fayetteville permit testified that the facility's discharge will improve Oklahoma water quality because it "will result in much less algal growth in Lake Frances and improved water clarity in the Illinois River below Lake Frances as well as benefiting Lake Tenkiller." Rebuttal Testimony of Jack H. Gakstatter, EPA Office of Research & Development (Index No. EPA-4, Log. No. 121, p. 5).

The fact that the Tenth Circuit's decision would now prevent the City of Fayetteville from operating its $40 million state-of-the-art plant further demonstrates the extreme nature of the Tenth Circuit's holdings. As even the Oklahoma Department of Health acknowledged, the Fayetteville plant incorporates "the most thorough and complete treatment currently available." Ark. Pet. App. at 105a. There is absolutely no question that the new Fayetteville facility is environmentally superior to the previous plant it has replaced. Allowing Oklahoma to block this improvement simply cannot be reconciled with the purposes and objectives of the CWA.

CONCLUSION

For the foregoing reasons, and for those stated in the petitions, a writ of certiorari should be granted.

Respectfully submitted,

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